CASES

DECIDED BY

THE SUPREME COURT OF CYPRUS

IN ITS ORIGINAL JURISDICTION AND ON APPEAL FROM THE DISTRICT COURTS.

[TRIANTAFYLLIDES, P., STAVRINIDES, L. LOIZOU, JJ.]

KYROS DEMOSTHENOUS,

Appellant-Defendant,

v.

MICHAEL ANTONIOU,

Respondent-Plaintiff.

(Civil Appeal No. 5333).

1975
Jan. 8
—
KYROS DEMOSTHENOUS
v.
MICHAEL ANTONIOU

Civil Procedure—Practice—Stay of proceedings—Principles applicable—Medical examination of plaintiff—Requested by defendant at close of plaintiff's case—Objected to by plaintiff—Stay subject to certain conditions.

Practice—Stay of proceedings—Medical examination.

On the second day of the trial of an action for personal injuries and after all the evidence for the respondent (plaintiff) had been called, appellant's (defendant's) counsel applied orally that a specialist, who was going to testify as a witness for the appellant, should be allowed, there and then, during a short break, to examine the respondent as regards the after-effects of his injuries; counsel for the respondent objected to such a course and at that stage counsel for the appellant observed that the Court had power to stay the proceedings if the respondent continued to refuse to be so examined.

At the time it was not objected that the application

made by the appellant did not comply with the relevant procedural requirements; and the Court, with the concurrence of counsel on both sides, proceeded to deal with the matter as if it had before it a formal application to stay the proceedings because of the refusal of the respondent to submit to the said medical examination. The Court by its ruling refused to stay the proceedings. The ruling was based on the ground that the appellant, as a defendant, could not possibly have the right to compel a plaintiff, (the respondent) to submit to a medical examination and that an order staying the proceedings would be an indirect method of achieving that object; such an order would, in the view of the trial judge, amount to an improper interference with the respondent's right to present his case in his own way.

Held, 1. The correct principle governing the matter before us appears to be what has been stated by Denning M.R. in *Edmeades* v. *Thames Board Mills, Ltd.*, [1969] 2 All E.R. 127 at p. 129: "This Court has ample jurisdiction to grant a stay whenever it is just and reasonable so to do. It can, therefore, order a stay if the conduct of the plaintiff in refusing a reasonable request is such as to prevent the just determination of the cause". (See, also, *Lane* v. *Willis* [1972] 1 All E.R. 430, *Clarke* v. *Martlew and Another* [1972] 3 All E.R. 764, *McGinley* v. *Burke*, [1973] 2 All E.R. 1010, and *S.* v. *S.*, *W* v. *Official Solicitor*, [1970] 3 All E.R. 107 at p. 114).

2. In the light of the law governing the matter it is abundantly clear that the trial judge misdirected himself in law in refusing, for the reasons given by him to stay the proceedings. We have decided that the proceedings in the action shall be stayed until the respondent submits himself to a medical examination.

Appeal allowed.

Cases referred to:

Pickett v. *Bristol Aeroplane Co. Ltd.* (cited in Bingham's Motor Claims Cases, 7th ed. p. 620);

Lane v. *Willis* [1972] 1 All E.R. 430, at p. 433;

Edmeades v. *Thames Board Mills, Ltd.* [1969] 2 All E.R. 127 at pp. 129 and 130;

Baugh v. *Delta Water Fittings Ltd.* [1971] 3 All E.R. 258;

Clarke v. *Martlew and Another* [1972] 3 All E.R. 764;

McGinley v. *Burke* [1973] 2 All E.R. 1010;

S. v. *S., W.* v. *Official Solicitor* [1970] 3 All E.R. 107 at p. 114;

Causton v. *Mann Egerton (Johnsons) Ltd.*, [1974] 1 All E.R. 453.

Appeal.

Appeal by defendant against the ruling of the District Court of Paphos (HjiConstantinou, D.J.) dated the 1st July, 1974, (Action No. 693/73) refusing, during the hearing of an action for personal injuries, to stay the proceedings until the plaintiff would agree to submit to a medical examination by a specialist who would be called as a witness.

L. Demetriades, for the appellant.

E. Komodromos, for the respondent.

Cur. adv. vult.

The facts sufficiently appear in the judgment of the Court which was delivered by :-

TRIANTAFYLLIDES, P. : The appellant, who is the defendant before the Court below, complains against the refusal of such Court, during the hearing of an action for personal injuries brought by the respondent, who is the plaintiff in the action, to stay the proceedings until the respondent would agree to submit to a medical examination by a specialist who was going to be called as a witness by the appellant.

The procedural matter in question arose before the trial Court in a rather unorthodox way because of the fact that counsel who was appearing at the time for the appellant did not comply duly with the requirements of the appropriate procedure in seeking an order staying the proceedings : What has happened is that on the 18th June, 1974, on the second day of the trial, and after

all the evidence for the respondent had been called, appellant's counsel applied orally that a specialist, Dr. Matsas, who was going to testify as a witness called by the appellant, should be allowed, there and then, during a short break, to examine the respondent as regards the after-effects of his injuries; counsel for the respondent objected to such a course and it was at that stage that counsel for the appellant observed that the Court had power to stay the proceedings if the respondent continued to refuse to be so examined.

It was not objected at the time that the application made by the appellant did not comply with the relevant procedural requirements; and the Court, with the concurrence of counsel on both sides, proceeded to deal with the matter as if it had before it a formal application to stay the proceedings because of the refusal of the respondent to submit to a medical examination by Dr. Matsas. It delivered a Ruling, on the 1st July, 1974, by means of which it refused to stay the proceedings; the Ruling was based on the ground that the appellant, as a defendant, could not possibly have the right to compel a plaintiff, the respondent, to submit to a medical examination and that an order staying the proceedings would be an indirect method of achieving that object; such an order would, in the view of the trial judge, amount to an improper interference with the respondent's right to present his case in his own way.

The said Ruling appears to have been based, to a certain extent, on the unreported case of *Pickett* v. *Bristol Aeroplane Co. Ltd.*, (see Bingham's Motor Claims Cases, 7th ed., p. 620). The true effect of the *Pickett* case has been explained in the later case of *Lane* v. *Willis* [1972] 1 All E.R. 430, where Davies, L.J. stated, on appeal, the following (at p. 433) :-

> "We have been referred to a number of authorities in this case, and it is necessary that I should deal with them to some extent. The first case to which I would refer is an unreported case, *Pickett* v. *Bristol Aeroplane Co. Ltd.*, in which Donovan L.J. delivered the judgment from which the learned judge quoted. That case was decided in 1961, and it was a decision of this Court composed of Wilmer

and Donovan L.JJ. I do not propose to quote any more than did the learned judge in the note of his judgment which I have just read. But I would point out two things which are inherent in what Donovan L.J. said: One, that the Court expressed no doubt at all that there was jurisdiction to make such an order, and secondly, that the real ground on which the Court acted there was that the defendants were insisting on an examination by one particular doctor to whom the plaintiff objected. That was the basis of their refusal to make the order. It is perfectly true that in the instant case it is only one particular doctor, i.e. Dr. Leigh, that the defendant is suggesting should examine the plaintiff. But counsel for the plaintiff in this Court has said in terms that it is not the personality of the doctor, Dr. Leigh, to which objection is taken...".

The correct principle governing the matter before us appears to be what has been stated by Denning, M.R. in *Edmeades* v. *Thames Board Mills, Ltd.* [1969] 2 All E.R. 127; he said (at p. 129) :-

> "This Court has ample jurisdiction to grant a stay whenever it is just and reasonable so to do. It can, therefore, order a stay if the conduct of the plaintiff in refusing a reasonable request is such as to prevent the just determination of the cause. The question in this case is simply whether the request was reasonable or not."

Notwithstanding that the above approach was doubted by Lawson J. in *Baugh* v. *Delta Water Fittings Ltd.*, [1971] 3 All L.R. 258, it is now well established that such approach is legally correct; it has been re-affirmed in a number of subsequent cases including the *Lane* case, *supra*, *Clarke* v. *Martlew and Another* [1972] 3 All E.R. 764, *McGinley* v. *Burke* [1973] 2 All E.R. 1010, and *S.* v. *S., W.* v. *Official Solicitor* [1970] 3 All E.R. 107 (at p. 114).

It has been pointed out in the *Lane* case, *supra*, (at p. 436), and confirmed in the *McGinley* case, *supra* (at p. 1012), that :-

> "When the refusal of a medical examination is

alleged to be unreasonable, the onus lies on the party who says that it is unreasonable and who applies for the order to show, on the particular facts of the case, that he is unable properly to prepare his claim (or defence) without that examination. The onus lies firmly on the applicant, as counsel for the defendant very rightly conceded".

It is appropriate to make it clear that, as explained by Widgery L.J. in the *Edmeades* case, *supra* (at p. 130), there is no question of making a direct order for a medical examination, which could presumably entail proceedings for contempt in case of refusal to comply with it; there can only be made an order staying the proceedings, unless and until a plaintiff agrees to be medically examined; in effect, it gives such plaintiff a right to elect between not going on with his action or submitting himself to a medical examination.

It is useful, too, to stress that, as held in the *Clarke* case, *supra,* fairness requires that where a defendant seeks to have a plaintiff medically examined he should give an undertaking to make the report of the examination available to the plaintiff; and in the *McGinley* case, *supra,* it was pointed out that a plaintiff could make it a condition, of submitting to a medical examination, that the defendant should provide him with a copy of the report, only if he was willing to offer in exchange, on a basis of reciprocity, his own equivalent report on which he proposed to rely.

In *Causton* v. *Mann Egerton (Johnsons) Ltd.,* [1974] 1 All E.R. 453, the *Clarke* and *McGinley* cases, *supra,* were affirmed, but it was made clear that, in the absence of an agreement between the parties, a Court has not, otherwise, power to order directly a party to produce medical reports, which are privileged documents.

In the light of the foregoing review of the law it is abundantly clear that in the present case the trial judge misdirected himself in law in refusing, for the reasons given by him, to stay the proceedings. The question now arises as to what order we should make in the circumstances: We have taken into account, in this respect, the fact that, as shown by relevant correspondence exchanged between counsel prior to the trial, there was

never actually a refusal by the respondent to submit to a medical examination by Dr. Matsas and so there does not arise the question of non-acceptance to be examined by a particular medical specialist; what appears to have happened is that, though it was agreed between counsel that the respondent would be examined by Dr. Matsas before the trial, such examination did not in fact take place and so the matter was raised again during the course of the hearing before the Court below. We have, therefore, decided to order that the proceedings in the action shall be stayed until the respondent submits himself to a medical examination by Dr. Matsas; counsel for the appellant should make available to counsel for the respondent a copy of the relevant report of Dr. Matsas; moreover, the respondent, on receiving such report, shall be entitled to recall for further evidence his own expert witness, Dr. Kareklas, or to call any other evidence relevant to the contents of the said report.

Regarding the question of costs we are of the view that the costs of counsel for the respondent in respect of both the 18th June, 1974, and the 1st July, 1974, should be borne by the appellant; and that the costs of this appeal shall be costs in the cause but, in any case, not against the respondent.

On these terms the appeal is allowed.

Appeal allowed.
Order for costs as above.